

United States

2

Circuit Court of Appeals

For the Ninth Circuit.

JACKSON C. SAIN, HETTIE SAIN, ED. RAY,
JOSEPH H. McDONALD, MISSOULA
COUNTY, TENNIE E. GREENOUGH,
CLARA PIDGE, W. T. BURNETT, GEORGE
CROMWELL, GLENN STICHT, G. W.
LEAPHART, JOSEPHINE YOUNGQUIST,
HARRY E. STETSON, et al.,

Appellants,

vs.

THE MONTANA POWER COMPANY,
a corporation,

Appellee.

Supplemental Transcript of Record

Upon Appeal from the District Court of the
United States for the District of Montana.

FILED
MAR 20 1935

PAUL R. MORRIS,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACKSON C. SAIN, HETTIE SAIN, ED. RAY,
JOSEPH H. McDONALD, MISSOULA
COUNTY, TENNIE E. GREENOUGH,
CLARA PIDGE, W. T. BURNETT, GEORGE
CROMWELL, GLENN STICHT, G. W.
LEAPHART, JOSEPHINE YOUNGQUIST,
HARRY E. STETSON, et al.,

Appellants,

vs.

THE MONTANA POWER COMPANY,
a corporation,

Appellee.

Supplemental
Transcript of Record

Upon Appeal from the District Court of the
United States for the District of Montana.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Attorneys, Names and Addresses.....	1
Assignment of Errors.....	6
Bond on Appeal.....	11
Caption	1
Citation on Appeal.....	14
Clerk's Certificate to Transcript.....	18
Decree	2
Order Allowing Appeal.....	4
Petition for Allowance of Appeal.....	2
Prayer for Reversal.....	5
Praecipe for Supplemental Transcript.....	17
Stipulation for Supplemental Transcript.....	15

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

Mr. E. C. MULRONEY,
of Missoula, Montana, and

Mr. S. P. WILSON
of Deer Lodge, Montana,
Attorneys for plaintiffs and appellants.

Mr. W. L. MURPHY
of Missoula, Montana, and

Mr. A. N. WHITLOCK
of Missoula, Montana,
Attorneys for defendant and appellee. [1*]

In the District Court of the United States
in and for the District of Montana.

No. 1488

JACKSON C. SAIN, et al.,

Plaintiffs,

vs.

THE MONTANA POWER COMPANY,
a corporation,

Defendant.

BE IT REMEMBERED that on April 25, 1934,
Decree was duly filed and entered herein, which is
in the words and figures following, to-wit: [2]

*Page numbering appearing at the foot of page of original certified
Transcript of Record.

In the District Court of the United States for the
District of Montana, Missoula Division.

No. 1488

JACKSON C. SAIN, et al.,

Plaintiffs,

vs.

THE MONTANA POWER COMPANY,
a corporation,

Defendant.

DECREE.

This cause came on to be heard at this term and was submitted by counsel for decision, and thereupon, upon consideration thereof the court filed written decision therein, and in accordance therewith IT IS ORDERED, ADJUDGED AND DECREED that said suit be dismissed without costs. Dated April 25, 1934.

BOURQUIN,

Judge.

[Endorsed]: Filed April 25, 1934. [3]

Thereafter, on July 23, 1934, Petition for Allowance of Appeal was filed herein, in the words and figures following to-wit: [4]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

[5]

The above named plaintiffs feeling themselves aggrieved by the decision, judgment and decree

entered in this cause on the 25th day of April, 1934, do hereby appeal to the Circuit Court of Appeals for the Ninth Circuit for the reasons assigned in the Assignment of Errors filed herewith and said plaintiffs pray that their appeal be allowed, and that citation issue as provided by law, and that the Transcript of Record, proceedings and papers upon which said decree was based duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of California, under the rules of such Court in such cases made and provided.

And your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

Dated this 19th day of July, 1934.

S. P. WILSON and

E. C. MULRONEY,

Attorneys for Plaintiffs.

State of Montana,
County of Missoula—ss.

Jackson C. Sain, being duly sworn upon oath says:

That he is one of the petitioners foregoing named and he makes this verification for and on behalf of all the petitioners; that he has heard read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge, information and belief.

JACKSON C. SAIN.

Subscribed and sworn to before me this 19th day of July, 1934.

[Seal] EDWARD C. MULRONEY,
Notary Public for the State of Montana, residing
at Missoula. My commission expires June
15, 1935. [6]

Service of the foregoing petition for allowance of appeal is hereby admitted and a copy of the same received at Missoula, Montana, this 23rd day of July, 1934.

W. L. MURPHY,
A. N. WHITLOCK,
Attorneys for Defendant.

[Endorsed]: Filed July 23, 1934. [7]

Thereafter, on July 23, 1934, Order Allowing Appeal was filed herein, in the words and figures, following, to-wit: [8]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL. [9]

Upon reading and considering the petition for appeal on file herein together with the Assignment of Errors on file herein:

IT IS HEREBY ORDERED that the appeal of Jackson C. Sain and the other plaintiffs to the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby allowed,

upon the filing of a good and sufficient bond in the sum of \$300.00 to be approved by the Court.

Dated this 23rd day of July, 1934.

CHAS. N. PRAY,

Judge.

Service of the foregoing order allowing appeal is hereby admitted and a copy of the same received at Missoula, Montana, this 23rd day of July, 1934.

W. L. MURPHY,

A. N. WHITLOCK,

Attorneys for Defendant.

[Endorsed]: Filed July 23, 1934. [10]

Thereafter, on July 23, 1934, Prayer for Reversal was filed herein, in the words and figures, following, to-wit: [11]

[Title of Court and Cause.]

PRAYER FOR REVERSAL. [12]

Come now the plaintiffs in the above-entitled action and pray that the decision, judgment and decree entered herein in the District Court of the United States in and for the District of Montana on the 25th day of April, 1934, be reversed by the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further orders as may be fit and proper in the premises be

made in the above-entitled cause by said Circuit Court of Appeals.

Dated this 23rd day of July, 1934.

E. C. MULRONEY and

S. P. WILSON,

Attorneys for Plaintiffs.

Service of the foregoing prayer for reversal is hereby admitted and a copy of the same received at Missoula, Montana, this 23rd day of July, 1934.

W. L. MURPHY,

A. N. WHITLOCK,

Attorneys for Defendant.

[Endorsed]: Filed July 23, 1934. [13]

Thereafter, on July 23, 1934, Assignment of Errors was filed herein, in the words and figures, following to-wit: [14]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS. [15]

Come now the plaintiffs in the above-entitled cause and file the following Assignment of Errors upon which they rely in the prosecution of their appeal from the decision, judgment and decree in said suit made and entered by the above-entitled Court on the 25th day of April, 1934.

I.

The Court erred in dismissing plaintiffs' Bill of Complaint.

II.

The Court erred in finding and holding that the Court is without jurisdiction in the cause.

III.

The Court erred in finding and holding that the State Court and not the United States Court has jurisdiction to hear and determine the matters at issue as shown by the pleadings in the cause.

IV.

The Court erred in finding and holding that to entertain this suit and decide the same in accordance with justice and the rights of the parties would constitute an invasion of the jurisdiction of the State Court.

V.

The Court erred in finding and holding that plaintiffs may not have an injunction and restraining order in this cause as prayed for in the complaint in this cause.

VI.

The Court erred in finding and deciding against the plaintiffs in this action and in favor of the defendant.

VII.

The Court erred in granting to the plaintiffs the injunction and relief prayed for in the complaint.

VIII. [16]

The Court erred in not finding each of the proposed findings of fact that were requested by the

plaintiffs, to be true, the same being numbered Findings of Fact requested by plaintiffs numbered 1 to 19, inclusive, and the Court erred in failing to find and decide that each and all of said proposed Findings of Facts are true.

IX.

The Court erred in not finding and deciding that defendant herein has the legal right to divert from Rattlesnake Creek at the place designated on the maps introduced in evidence in this cause as "Dam" to the extent that it has need therefor, the water awarded and adjudicated to its predecessors in the decree in Cause No. 1953 by rights Nos. 3, 8 and 14 of the Findings of Fact in said decree and within the limits and according to the priorities prescribed in said decree, for the purpose of supplying the city of Missoula and its inhabitants with water, but defendant does not have the right to divert at said place designated on said maps as "Dam" water to satisfy any of the other decreed rights included or adjudicated by the decree in Cause No. 1953 to its predecessors, whenever plaintiffs have need for such water.

X.

The Court erred in not finding and deciding that the attempt by defendant and its predecessors in interest to change the place of diversion of Right No. 1 in the Findings of Fact in the decree in Cause No. 1953 from the head of the Mill ditch to the "Dam", and likewise the attempt of defendant and

its predecessors in interest, to change the place of diversion of Right No. 2, in the Findings of Fact of the decree in Cause No. 1953, from the head of original Higgins ditch to the "Dam"; and likewise the attempt of defendant and its predecessors in interest to change the place of appropriation of Right No. 9 in [17] the Findings of Fact of the decree in Cause No. 1953 from the head of original Higgins ditch to the "Dam" are, and each of said attempts is, injurious to plaintiffs, and said attempts cause, and each said attempts causes, damage and prejudice to plaintiffs and all of plaintiffs.

XI.

The Court erred in not finding and deciding that plaintiffs are entitled to an injunction restraining defendant from making the changes in place of diversion of the water rights described in the complaint in this action and referred to in these findings, or making either or any of such changes, whenever plaintiffs or any of plaintiffs shall be unable to obtain water at his or their point of diversion on account of defendant's diversion, said plaintiff or plaintiffs then having need for such water. Particularly plaintiffs shall be entitled to enjoin and restrain defendant from changing the point of diversion of right No. 1 of the Findings of Fact in the decree in Cause No. 1953 from the head of the Mill ditch to the "Dam", and shall be entitled to enjoin and restrain defendant from changing the point of diversion of right No. 2 of the Findings of Fact of the decree in Cause No. 1953 from the head of the

original Higgins ditch to the "Dam", and shall be entitled to enjoin and restrain defendant from changing the point of diversion of Right No. 9 of the Findings of Fact of the decree in Cause No. 1953 from the head of original Higgins ditch to the "Dam", at any time whenever plaintiffs or any of plaintiffs have need for the water to satisfy their own appropriations and are unable to obtain the water to satisfy their own appropriations because of defendant's diversion thereof.

XII.

The Court erred in not finding and deciding the claim of defendant to have the right to change the point of diversion [18] of the water awarded and decreed to its predecessors in interest in Findings 1, 2 and 9, from the head of the Mill ditch and original Higgins ditch to the "Dam", is wrongful and without authority of law and is invalid, being injurious to plaintiffs, and defendant shall not have the right to make change of the point of diversion of said water rights, nor any thereof, whenever plaintiffs, or any of plaintiffs, have need for such water and are deprived of the water on account of any diversion of water by defendant.

XIII.

The Court erred in not finding and deciding that the plaintiffs were not guilty of laches, either in the commencement of their suit, or in the prosecution thereof, and that the plaintiffs' right of action set forth in the pleadings herein against the defendant is not barred by laches.

XIV.

The Court erred in not finding and deciding that the plaintiffs' action was instituted in good time and is not barred by the statute of limitations.

XV.

The Court erred in not finding and deciding the issues herein in favor of plaintiffs and against defendant.

WHEREFORE, plaintiffs pray that the decree herein be reversed.

E. C. MULRONEY and
S. P. WILSON,

Attorneys for Plaintiffs.

Service of the within Assignment of Errors is hereby admitted and a copy thereof received at Missoula, Montana, this 23rd day of July, 1934.

W. L. MURPHY,
A. N. WHITLOCK,

Attorneys for Defendant.

[Endorsed]: Filed July 23, 1934. [19]

Thereafter, on July 23, 1934, Bond on Appeal was filed herein, in the words and figures following, to-wit: [20]

[Title of Court and Cause.]

BOND ON APPEAL. [21]

KNOW ALL MEN BY THESE PRESENTS:

That we, Jackson C. Sain, in his own behalf and on behalf of all the plaintiffs above named, as prin-

cipal, and Chas. Ferguson, of Missoula, Montana, by occupation a real estate broker, and Abbon M. Lucy, of Missoula, Montana, by occupation a merchant, are held and firmly bound unto Montana Power Company, a corporation, the defendant above named in the full sum of Three Hundred Dollars, to be paid to the said defendant, its successors or assigns to which payment well and truly to be made, said principal and said sureties bind themselves, their, and each of their, successors and assigns, jointly and severally, firmly by these presents.

Sealed and dated this 19th day of July, 1934.

WHEREAS, in the District Court of the United States for the District of Montana in the above-entitled suit pending in said Court between the above named plaintiffs and the above named defendant, a decision, judgment and decree was rendered against the plaintiffs upon the 25th day of April, 1934, which judgment was entered on the 25th day of April, 1934, and said plaintiffs have petitioned for an appeal from said decision, judgment and decree to the Circuit Court of Appeals of the United States for the Ninth Circuit and said plaintiffs propose to prosecute said appeal to reverse the said decision, judgment and decree and answer all costs if they fail to make their plea good.

NOW, THEREFORE, in consideration of said appeal, the condition of this obligation is such that if the plaintiffs shall prosecute their said appeal to effect and answer all costs if they fail to make good

their plea, then this obligation shall be void, otherwise to remain in full force and effect.

JACKSON C. SAIN,
CHAS. FERGUSON,
ABBON M. LUCY. [22]

State of Montana,
County of Missoula—ss.

Chas. Ferguson and Abbon M. Lucy, the sureties named in the above bond, being duly sworn, each for himself, says that he is a free holder and resident within said Missoula County, Montana, and is worth the said sum of Three Hundred Dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

CHAS. FERGUSON,
ABBON M. LUCY.

Subscribed and sworn to before me this 23rd day of July, 1934.

[Seal] EDWARD C. MULRONEY,
Notary Public for the State of Montana, residing
at Missoula, Montana. My commission expires
June 15, 1935.

The foregoing bond approved this 23rd day of July, 1934.

CHAS. N. PRAY,

Judge.

[Endorsed]: Filed July 23, 1934. [23]

Thereafter, on July 23, 1934, Citation was duly issued herein, which original Citation is hereto annexed and is in the words and figures following, to-wit: [24]

[Title of Court and Cause.]

CITATION. [25]

United States of America to Montana Power Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, California, which thirty days of the date hereof pursuant to an order filed and entered in the office of the Clerk of the District Court of the United States for the District of Montana, allowing an appeal from a decision, judgment and decree filed and entered in said Court on the 25th day of April, 1934, in favor of the defendant and against the plaintiffs in the above-entitled action being In Equity Number 1488, wherein you are the defendant and the above named plaintiffs are the plaintiffs, to show cause, if any there be, why the decision, judgment and decree rendered against the said plaintiffs, as in said appeal mentioned, should not be reversed and corrected and why justice should not be done the parties in that behalf.

WITNESS the Honorable Judge of the United States District Court for the District of Montana, the 23rd day of July, 1934.

CHARLES N. PRAY,

Judge.

Service of the foregoing citation admitted and a copy thereof received at Missoula, Montana this 23rd day of July, 1934.

MURPHY & WHITLOCK,
Attorneys for Defendant.

[Endorsed]: Filed July 27, 1934. [26]

Thereafter, on August 22, 1934, Stipulation for Supplemental Transcript of Record was filed herein, in the words and figures, following, to-wit: [28]

[Title of Court and Cause.]

STIPULATION. [29]

WHEREAS, in this cause plaintiffs took and perfected an appeal from the decision of the Court dated and filed on February 5th, 1934, and plaintiffs, as appellants, caused a transcript on appeal to be prepared and filed with the Clerk of the Circuit Court of Appeals, Ninth Circuit, wherein is set forth the pleadings in this cause and proceedings upon the trial and the testimony of the witnesses together with the proceedings taken in perfecting said appeal;

AND WHEREAS, a decree was signed, dated and filed upon April 25th, 1934, and the plaintiffs, desiring to appeal from said judgment of date April 25th, 1934, have petitioned for the allowance of an appeal and such an appeal has been allowed by the above court by an order of allowance of appeal of date July 23rd, 1934;

AND WHEREAS, the parties hereto, both plaintiffs and defendant, desire to avoid any needless repetition or duplication of the record or transcript on appeal in this cause and do make and enter into this stipulation with the view of, and for the purpose of, avoiding the necessity of preparing another transcript on appeal, or rewriting, or duplicating, the transcript of record already prepared and filed as aforesaid.

NOW THEREFORE, it is stipulated and agreed between the parties hereto, by their respective attorneys, that the transcript of record already prepared and filed herein and served by appellants upon appellee shall, together with copies of the decree dated and signed April 25, 1934, Petition for Allowance of Appeal, Order Allowing Appeal, Prayer for Reversal, Assignment of Errors, Citation and Bond on Appeal, Praecipe to Clerk and this Stipulation constitute the record on appeal from the judgment of April 25th, 1934, which said papers shall be printed as supple- [30] mental transcript on appeal.

Dated August 21st, 1934.

E. C. MULRONEY and
S. P. WILSON,

Attorneys for Appellants.

W. L. MURPHY and
A. N. WHITLOCK,

Attorneys for Appellee.

[Endorsed]: Filed Aug. 22, 1934. [31]

Thereafter, on August 22, 1934, Praeceptum for Supplemental Transcript of Record was filed herein, in the words and figures following, to-wit: [32]

[Title of Court and Cause.]

PRAECIPE. [33]

To the Clerk of the above-entitled Court:

You will please prepare a Transcript of the Record to be filed in United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal from the judgment dated April 25th, 1934, which appeal is duly allowed in the above-entitled cause, and you will please incorporate in such Transcript of Record the following papers, to-wit:

1. Stipulation entered into between plaintiffs in this action and the defendant, by their respective attorneys, which stipulation bears date August 21st, 1934.

2. Decree dated and filed April 25th, 1934.

3. Petition for allowance of appeal.

4. Order allowing appeal.

5. Prayer for reversal.

6. Assignment of errors.

7. Citation on appeal.

8. Bond on appeal.

9. This praecipe with acknowledgment of service thereon.

Said Transcript to be prepared and duly certified by you as required by law and the rules of the above-entitled court and the rules of the United

States Circuit Court of Appeals for the Ninth Circuit.

Dated this 21st day of August, 1934.

E. C. MULRONEY and
S. P. WILSON,

Attorneys for Plaintiffs.

Service of the foregoing praecipe is hereby admitted and a copy of the same received at Missoula, Montana, this 21st day of August, 1934.

W. L. MURPHY,

A. N. WHITLOCK,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 22, 1934. [34]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 34 pages, numbered consecutively from 1 to 34 inclusive, constitute full, true and correct copies and transcript of the following parts of the record in case No. 1488, Sain, et al. vs. Montana Power Company, as appears from the original records and files of said court in my custody as such Clerk, to-wit:

1. Stipulation entered into between plaintiffs in this action and the defendant, by their respective attorneys, which stipulation bears date August 21st, 1934.

2. Decree dated and filed April 25th, 1934.

3. Petition for allowance of appeal dated and filed July 23rd, 1934.

4. Order allowing appeal dated and filed July 23rd, 1934.

5. Prayer for reversal dated and filed July 23rd, 1934.

6. Assignment of errors dated and filed July 23rd, 1934.

7. Citation on appeal dated July 23rd, 1934.

8. Bond on appeal dated and filed July 23rd, 1934.

9. Praecipe with acknowledgment of service thereon filed August 22nd, 1934.

I do further certify that the foregoing documents are prepared to constitute a Transcript of Record upon appeal from said judgment of date April 25th, 1934 and that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

And I further certify that the costs of said transcript of record amount to the sum of Three and 50/100 Dollars (\$3.50), and have been paid by the appellants. [35]

Witness my hand and the seal of said court at Helena, Montana, this August 22nd, A. D. 1934.

[Seal]

C. R. GARLOW,

Clerk as aforesaid. [36]

[Endorsed]: No. 7499. United States Circuit Court of Appeals for the Ninth Circuit. Jackson C. Sain, Hettie Sain, Ed. Ray, Joseph H. McDonald, Missoula County, Tennie v. Greenough, Clara Pidge, W. T. Burnett, George Cromwell, Glenn Sticht, G. W. Leaphart, Josephine Youngquist, Harry E. Stetson, et al., Appellants, vs. The Montana Power Company, a corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed August 24, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.